STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

TDS Metrocom, LLC,	)	
	)	
v.	)	
	)	
Illinois Bell Telephone Company	)	**Docket No. 03-0553**
	)	
Complaint concerning imposition of unreasonable and anti-competitive termination charges by Illinois Bell Telephone Company.	)))	

INITIAL BRIEF OF TDS METROCOM, LLC

Peter R. Healy
Manager CLEC External Relations
TDS Metrocom, LLC
525 Junction Road, Suite 6000
Madison, Wisconsin 53717
(608) 664-4117
peter.healy@tdsmetro.com

Owen E. MacBride
6600 Sears Tower
Chicago, Illinois 60606
(312) 258-5680
omacbride@schiffhardin.com

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I. <u>SUMMARY OF TDS METROCOM'S POSITION</u>

TDS Metrocom, LLC ("TDS Metrocom") initiated this docket by filing a Complaint against Illinois Bell Telephone Company ("SBC" or "SBC Illinois") alleging that SBC Illinois' practices regarding termination charge provisions included in its multi-year contracts with business customers were unreasonable and anticompetitive. TDS Metrocom filed its Complaint because it had encountered several prospective business telecommunications customers that had signed multi-year contracts with SBC which specified minimum annual revenue commitments during the term of the contract and required the customer, should it desire to terminate the contract prior to the end of the multi-year term, to pay SBC all or a substantial portion of the minimum annual revenue commitment for the remainder of the contract term. It is TDS Metrocom's position, as articulated in its Complaint, that these termination liability provisions are unreasonable, anticompetitive and an impediment to the development of local competition, in violation of Sections 9-250 and 13-514 of the Public Utilities Act ("PUA")[1], because they bear no reasonable relationship to any loss or damage experienced by SBC should the customer terminate the contract; and that this form of termination liability provision is inconsistent with the Commission's rulings in *Association of Communications Enterprises v. Ameritech Illinois, Inc.*, Docket 00-0024 (Order on Rehearing issued Feb. 20, 2002) (the "*ASCENT* Case" or "*ASCENT* Order"). Discovery conducted in this case revealed that SBC has hundreds, perhaps thousands, of multi-year contracts in effect with business customers containing this form of termination liability.

TDS Metrocom's Complaint requested that the Commission direct SBC Illinois to immediately replace all contractual and tariff termination liability provisions of the form

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[1] 220 ILCS 5/9-220; 220 ILCS 5/13-514.

described in the preceding paragraph with termination charge provisions conforming to the directive in Finding (9) of the *ASCENT* Order. Finding (9) required SBC to calculate termination charges for its "ValueLink", "CompleteLink" and "Straight Rate" calling plans by subtracting the discounted charges the customer actually incurred during its term of service from the discounted charges the customer should have incurred, based on the discount applicable to the customer's actual term of service under the pertinent calling plan.

During the course of this proceeding, SBC Illinois stated that it was revising its termination liability provisions in contracts and tariffed term plans for business customers to adopt a consistent (and lower) set of termination liability charges. The revised SBC termination charge policies are as follows: (1) for Usage Services, 35% of the customer's remaining obligation under the tariff plan or agreement; (2) for Centrex Services, 25% of the customer's remaining obligation under the tariff plan or agreement; and (3) for other services (principally Data services), 50% of the customer's remaining obligation under the tariff plan or agreement. (See TDS Metrocom Ex. 1.0, pp. 17-18 and TDS Metrocom Ex. 1.4) TDS Metrocom acknowledges that SBC's revised policies represent an improvement over those in effect at the time the Complaint was filed. However, the termination charges produced by SBC's revised policies are still excessive, unreasonable and anticompetitive and at odds with the principles articulated by the Commission in the *ASCENT* Order.

In addition, during the course of this proceeding, TDS Metrocom became aware that SBC Illinois was ceasing its practice of providing termination charge calculations to a competitive local exchange carrier ("CLEC") that has written authorization from the retail customer to request and receive the termination charge calculation from SBC, except for those customers taking service under the specific calling plans that were the subject of the *ASCENT* Case.

(Provision of such calculations is required by Finding (10) of the *ASCENT* Order.) Regardless of the form of the termination liability provisions ordered or allowed by the Commission in this case, it is critical to the continued development of competition that TDS Metrocom and other CLECs be able to obtain timely calculations of the termination liabilities faced by prospective customers, through the process specified in Finding (10) of the *ASCENT* Order.

TDS Metrocom requests the following relief:

(1) SBC Illinois should be directed to immediately replace all contractual and tariffed termination liability provisions that require the customer to pay all or a portion of the customer's remaining minimum annual revenue commitment amount for the duration of the contract, with provisions calculating the customer's termination liability as the difference between the discount the customer received during its term of service and the discount the customer would have received had it initially entered into a contract or tariffed plan with a term equal to the customer's actual term of service. (Complaint, ¶40(b)-(c); TDS Metrocom Ex. 1.5, pp. 7-8)

(2) Alternatively, if the Commission (the *ASCENT* Order notwithstanding) finds acceptable the form of termination liability provision used by SBC Illinois (*i.e.*, a stated percentage of the customer's remaining revenue obligation under the contract or tariffed plan), the Commission should nonetheless find that the percentages adopted by SBC in its revised termination liability policies are excessive and unreasonable. The Commission should direct that the "percentage of remaining revenue" in SBC's multi-year contracts and tariffed calling plans for Usage, Centrex and Data services for business customers should not exceed 25%. (TDS Metrocom Ex. 1.5, p. 8)

(3) The Commission should direct (consistent with Finding (10) of the *ASCENT* Order) that for any multi-year contracts or tariffed plans with termination liability provisions, SBC

should provide to a CLEC a calculation of the termination liability to which a business customer taking service under the contract or tariffed plan would be subject if the customer terminated the contract or plan, upon presentation by the CLEC of written authorization from the customer to request and receive the termination charge calculation.[2] (TDS Metrocom Ex. 1.5, pp. 8-9)

(4) SBC has not attempted to defend the reasonableness of the termination liability provisions it had in effect at the time TDS Metrocom's Complaint was filed, choosing instead to attempt to focus attention on the revised termination liability provisions it announced during the course of this case. Further, it is apparent that SBC's comprehensive revision of its termination liability provisions occurred in response to, or at least was galvanized by, the filing of TDS Metrocom's Complaint. Therefore, even if the Commission declines to grant the relief requested by TDS Metrocom as summarized above, and essentially ratifies SBC Illinois' revised termination liability provisions, the Commission should order SBC to reimburse TDS Metrocom for its external legal and other out-of-pocket costs of this proceeding, as authorized by Section 13-516(a)(3) of the PUA. (220 ILCS 5/13-516(a)(3))

II. BACKGROUND

A. TDS Metrocom's Complaint

TDS Metrocom is a CLEC providing local exchange telecommunications services to residential and business customers in Illinois. As of October 31, 2003, TDS Metrocom was serving approximately 22,600 access lines in Illinois, of which approximately 13,400 were business access lines. TDS Metrocom has invested over $30 million in its Illinois CLEC

[2] Finding (10) of the *ASCENT* Order requires SBC to provide such calculations within three business days following the request. In light of concerns expressed by SBC witness Ms. Kent that processing a large volume of termination charge calculation requests within three business days may be administratively difficult (SBC Ex. 5.0, pp. 6-8), TDS Metrocom would not object were this period to be lengthened to five business days/seven calendar days.

operations and has installed its own switch in Illinois and collocated in various SBC Illinois central offices. As it seeks to become one of the leading competitive providers of local exchange services in northern Illinois, the principal areas in which TDS Metrocom is offering local exchange services at this time are the Rockford area, Lake County and northern and northwestern Cook County. (TDS Metrocom Ex. 1.0, pp. 1-2)

TDS Metrocom filed its Complaint in this proceeding on September 12, 2003. TDS Metrocom filed its Complaint as a result of finding several prospective business customers that had signed multi-year contracts with SBC Illinois for Usage and/or Centrex services containing termination liability provisions requiring the customer to pay all or a substantial percentage of the annual revenue commitment (or monthly charges) specified in the contract for the remainder of the contract term should the customer elect to terminate the contract to take service from a competitive provider such as TDS Metrocom. Further, upon being authorized by these customers to request from SBC calculations of these customers' termination liabilities, and obtaining the calculations, TDS Metrocom learned that the amounts of the termination charges that would be imposed on these customers were they to switch to TDS Metrocom were substantial. Specifically, one customer that had two 36-month contracts with approximately 23 months remaining faced about $167,000 in termination charges; a second customer with nine months remaining on a 36-month contract faced about $26,000 in termination charges; and a third customer with 32 months remaining on a 36-month contract faced termination charges of about $63,000. The percentage of the annual revenue commitment (or monthly charges) used to determine the termination liability in these contracts were 100% and 85% in the first customer's two contracts, 100% in the second customer's contract and 50% in the third customer's contract. None of these customers elected to switch to TDS Metrocom.[3]

TDS Metrocom's Complaint alleged that the practices reflected in the termination liability provisions of these SBC multi-year contracts were unjust and unreasonable and should be declared unjust and unreasonable by the Commission pursuant to Section 9-250 of the Public Utilities Act. Section 9-250 provides:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that the rates or other charges, or classifications, or any of them, demanded, observed, charged or collected by any public utility for any service or product or commodity, or in connection therewith, or that the rules, regulations, contracts, or practices or any of them, affecting such rates or other charges, or classifications, or any of them, are unjust, unreasonable, discriminatory or preferential, or in any way in violation of any provisions of law, or that such rates or other charges or classifications are insufficient, the Commission shall determine the just, reasonable or sufficient rates or other charges, classifications, rules, regulations, contracts or practices to be thereafter observed and in force, and shall fix the same by order as hereinafter provided.
>
> The Commission shall have power, upon a hearing, had upon its own motion or upon complaint, to investigate a single rate or other charge, classification, rule, regulation, contract or practice, or any number thereof, or the entire schedule or schedules of rates or other charges, classifications, rules, regulations, contracts and practices, or any thereof of any public utility, and to establish new rates or other charges, classifications, rules, regulations, contracts or practices or schedule or schedules, in lieu thereof.

TDS Metrocom's complaint also alleged that these termination liability provisions are anticompetitive and impede the development of competition in local telecommunications services markets in Illinois, in violation of Section 13-514 of the PUA. Section 13-514 states in pertinent part:

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[3]The identities of these customers, which are confidential, and the details of their SBC contracts and termination charge amounts, are set forth in paragraphs 14-25 of TDS Metrocom's Complaint and in the direct testimony of Jennifer Stearns, Manager-Commercial Market Development for TDS Metrocom (TDS Metrocom Ex. 2.0).

> A telecommunications carrier shall not knowingly impede the development of competition in any telecommunications service market. The following prohibited actions are considered per se impediments to the development of competition; however, the Commission is not limited in any manner to these enumerated impediments and may consider other actions which impede competition to be prohibited: . . . .

TDS Metrocom's Complaint stated that the termination liability provisions it had encountered were unreasonable, anticompetitive and an impediment to development of the competitive local exchange market because they require the customer to pay termination charges bearing no reasonable relationship to the loss or damage that SBC would experience if the customer terminated its contract, and have no purpose other than to lock up business customers for multi-year periods. (Complaint, ¶35-37) TDS Metrocom pointed out that in its *ASCENT* Order issued in February 2002, the Commission had found termination charge provisions similar to those that TDS Metrocom had recently encountered – namely, termination liability provisions requiring the customer to pay all or a substantial percentage of the annual revenue commitment specified in the term calling plan for the remainder of the term – to be unjust, unreasonable, and an impediment to the development of competition. (*Id.*, ¶10-11) Further, TDS Metrocom stated that based on its experience in attempting to market its services to these and other customers, and the fact that these customers' contracts were "form" contracts of SBC, it was likely that SBC Illinois had entered into many other multi-year contracts with business customers containing such termination liability provisions. (*Id.*, ¶31-32)

B. The *ASCENT* Order

In the *ASCENT* Case, the Association of Telecommunication Enterprises ("ASCENT") filed a complaint against Ameritech Illinois (now SBC Illinois) complaining of Ameritech's practice of requiring business customers electing service under certain multi-year calling plans to pay Ameritech the remaining amount of the customer's minimum annual revenue commitment for the balance of the contract term should the customer terminate service prior to the end of the term. ASCENT complained that this practice had a significant anticompetitive impact on CLECs because customers in the small to medium size commercial market cannot afford to absorb the termination charges associated with switching service from SBC to a competitive telecommunications carrier. ASCENT asserted that these termination charges impeded the development of competition because they were so high as to constitute a penalty, thus locking in potential customers of CLECs to long-term commitments to SBC Illinois.

In the *ASCENT* Order, the Commission concluded that SBC's termination charges were unreasonable and bore no reasonable relationship to the damages SBC would suffer if a customer terminated a term contract prior to its expiration. The Commission stated: "When a termination penalty for telecommunications services consists of the full minimum revenue contemplated by the agreement, it inherently exceeds actual damages", and noted that whatever SBC's actual damage may be when the agreement is terminated, it is something less than expected revenue, since the subject services cost something to provide. (*ASCENT* Order, p. 17) The Commission also concluded that both the intention and primary effect of these termination penalties has been to lock customers away from emerging competition. (*Id.*, p. 16) Thus, the Commission concluded that the termination penalties complained of were unjust and unreasonable under Section 9-250 of the PUA. (*Id.*, p. 18) The Commission also concluded that these termination penalties "are unreasonable impediments to the development of competition", that the termination penalties "have a substantial adverse impact on the ability of the customers to choose, and alternative carriers to provide, telecommunications services", and that consequently the termination penalties were unlawful under Section 13-514 of the PUA. (*Id.*, p. 17) The Commission therefore ordered SBC Illinois to cease imposing the termination penalties in question and to replace them with termination charges that allowed the customer to retain any discounts earned during the customer's term of service (i.e., prior to termination), but required the customer to pay SBC Illinois for any unearned discounts associated with the customer's term of service:

> In sum, we will order that the ValueLink termination penalties equal the unearned discount received by the customer during its actual term of service. The unearned discount should be calculated by subtracting the discounted charges the customer actually incurred during its term of service from the charges the customer should have incurred, based on its actual term of service, under the pertinent ValueLink tariff. Ameritech is prohibited from including earned discounts, as described in this Order, in a ValueLink termination charge. (*Id.*, p. 29; see also *Id.*, Finding (9))

C. Evidence on the Scope and Extent of SBC's Termination Liability Provisions

After filing its Complaint, TDS Metrocom was able to conduct discovery to determine the extent to which SBC Illinois was utilizing contracts with termination liability provisions such as those TDS Metrocom has encountered in its marketing activities. In response to TDS Metrocom's discovery request for copies of contracts with business customers in effect after January 1, 2002, with terms longer than 12 months and containing termination charge provisions, SBC Illinois indicated that it had potentially thousands of such contracts. (TDS Metrocom Ex. 1.0, pp. 10-11) By agreement, SBC produced summary information on these types of contracts in effect during 2001, 2002 and 2003 as well as copies of representative contracts. The summary information on contracts was organized by the following product/services types:

(1) Centrex service contracts;

(2) Usage Services, consisting of agreements for Access/Usage, Master Discount Agreements, NETSPAN and Toll/800 service; and

(3) Data Services/other, consisting of agreements for DS0, DS1, DS3, ISDN Prime, ISDN Direct Multi-Service Optical Networks, "Giga-MAN", SONET and Ameritech Digital Transport Service – Enhanced ("ADTSE").

The summary information indicated that SBC Illinois had hundreds of Centrex and Usage Services contracts and thousands of Data Services/other contracts in effect in these years. (*Id.*, pp. 11-12; TDS Metrocom Ex. 1.1)

The representative contracts provided by SBC were not selected through a formal random sampling process, but were selected based on a good faith effort by SBC Illinois to select and provide contracts representative of those it had in effect in 2001-2003 for the products and services listed above. (TDS Metrocom Ex. 1.0, p. 12) The representative contracts included a number of multi-year (36 to 60 months) agreements for Usage Services with termination provisions similar to those described in the Complaint. Each of these agreements provided for a termination charge ranging from 50% to 100% of the annual revenue commitment for the remaining term of the contract. (*Id.*, pp. 13-14; TDS Metrocom Ex. 1.2) The termination charge per remaining year of the term for each of these ten representative Usage Services agreements were as follows (TDS Metrocom Ex. 1.0, p. 16):

Contract Number	**Termination Charge per Remaining Year**
20030507-0454	$ 12,800
20000803-0314	$ 75,000
19970117-0015	$ 559,000
19980505-0002	$ 277,500
19990104-0216*	$3,400,000
19990624-0045	$ 25,000
19991220-0030	$ 42,000
20010627-0309	$ 50,750
20020125-0105	$ 401,500
20021101-0341	$ 25,100

*The termination liability is the net present value of the remaining Annual Commitment Level.

In addition to the representative Usage Services agreements, a number of the representative agreements for other types of services provided by SBC had termination liability provisions requiring payment of a high percentage of the customer's remaining obligation under the contract. There were at least 10 representative agreements provided for Centrex services that indicated that the termination charge would be 70% or more of the monthly charge for each month remaining under the agreement. The six representative GigaMAN service agreements that were provided all specified termination charges of either 60% or 75% of the monthly charge for each month remaining in the term of the agreement. There were seven representative SONET contracts provided that specified termination charges equal to 50%, 60% or 70% of the remaining monthly charges or remaining recurring revenue under the agreement. (TDS Metrocom Ex. 1.0, p. 19)[4]

The summary information provided by SBC Illinois showed that in each of the years 2001, 2002 and 2003, SBC Illinois had hundreds of active "competitive contracts" for Usage Service, received only a very small number of requests for calculation of termination charges, and had none of these agreements terminated. Additionally, during these three years SBC received a very small number of requests for calculation of termination charges for Centrex

[4]In contrast, virtually all of the representative contracts provided for DS0, DS1, DS3, ISDN Prime Service and ADTSE contained termination charge provisions specifying that the customer is responsible to pay SBC Illinois the difference between the amount of discounts actually received by the customer and the amount of discounts the customer would have received had it initially entered into a contract having a term equal to the period of service the customer actually completed before terminating the agreement, *i.e.*, the form of termination liability provision specified in the *ASCENT* Order. The termination charge provisions in these agreements also typically require payment of any non-recurring charges that were waived at installation. (TDS Metrocom Ex. 1.0, p. 20)

Services agreements, and only a very few of these agreements were terminated.[5] (TDS Metrocom Ex. 1.0, pp. 16-17; see data presented in TDS Metrocom Ex. 1.1.)

D. SBC Illinois' Revised Termination Liability Policies

Three days before TDS Metrocom's direct testimony was due to be filed, SBC Illinois advised TDS Metrocom that SBC was revising its termination liability policies applicable to tariffed term plans and customer-specific agreements, both on a prospective basis for new contracts and retroactively for contracts already in effect.[6] The revised policies are as follows:

(1) For Centrex Services, 25% of the customer's remaining obligation under the tariff plan or agreement;

(2) For Usage services, 35% of the customer's remaining obligation under the tariff plan or agreement; and

(3) For all other services among those identified in SBC's discovery responses (principally agreements for Data Services), 50% of the customer's remaining obligation under the tariff plan or agreement. (TDS Metrocom Ex. 1.0, p. 17; TDS Metrocom Ex. 1.4)

TDS Metrocom calculated what the termination charge (per remaining year of the contract term) would be for the ten representative Usage agreements under SBC's new policy. These amounts are as follows (TDS Metrocom Ex. 1.0, pp. 18-19):

Contract Number	Termination Charge per Remaining Year
20030507-0454	$ 8,960
20000803-0314	$ 26,250
19970117-0015	$ 195,650
19980505-0002	$ 129,500

[5]The specific numbers of competitive contracts in effect and requests for termination charge calculations received by SBC in these years are proprietary information of SBC. The specific numbers are detailed on Attachment 1 to SBC's response to TDS Metrocom Data Request 1.1 which is included in TDS Metrocom Exhibit 1.1.

[6]Under the revised policy, for contracts already in effect, a customer wishing to terminate could elect the termination charges produced by its existing contract provisions or by the new SBC policy. (TDS Metrocom Ex. 1.4)

19990104-0216*	$1,190,000
19990624-0045	$ 8,750
19991220-0030	$ 14,700
20010627-0309	$ 17,762
20020125-0105	$ 281,050
20021101-0341	$ 17,570

*The termination liability is the net present value of the remaining Annual Commitment Level

III. ARGUMENT

A. SBC's Termination Charges Are Unreasonable, Even Under SBC's Revised Policies; the Commission Should Either Direct SBC to Adopt the Form of Termination Provision Ordered in the *ASCENT* Case, or Limit the Percent of Remaining Revenue that SBC Can Impose as a Termination Charge to 25 Percent

TDS Metrocom does not object to SBC entering into multi-year agreements with business customers, nor to the inclusion in such contracts of provisions requiring the customer to pay a termination charge if the customer wishes to terminate the contract to switch to another provider. However, SBC's termination charges, even under its revised policies, are excessive, unreasonable and an impediment to competition. Because of the size of the termination charges they produce, SBC's termination provisions make it extremely difficult for a CLEC such as TDS Metrocom to persuade a customer, that is otherwise interested in switching its service from SBC to the CLEC, to in fact make the switch prior to expiration of the customer's multi-year contract with SBC. (TDS Metrocom Ex. 1.0, p. 5)

As Mr. Loch, TDS Metrocom's Vice President-Sales, explained, from a customer perspective, the payment that must be made upon termination of the SBC contract is large in the absolute, and would tend to overwhelm any price savings or other benefits the customer would otherwise realize by switching from SBC Illinois to TDS Metrocom. Further, in many cases it appears that the termination payment penalizes the customer by extracting an amount in excess of any actual benefit the customer received by virtue of the discounts under the agreement. The end result is that the customers that have entered into this type of contract are removed from the competitive marketplace and from the body of customers for which TDS Metrocom and other CLECs would otherwise be able to compete, by the requirement that the customer pay termination charges that are large and unreasonable. (*Id.*, p. 6) TDS Metrocom's experience with the customers it encountered in its marketing activities (as described in the Complaint and in the direct testimonies of Mr. Loch and Ms. Stearns), as well as SBC's own statistics on the very small numbers of such contracts that have been terminated (see Section II.C, above), demonstrates that SBC's termination charge provisions have provided a strong barrier to customer switching.

Further, given the size of the termination charges, it is not practical for a CLEC to agree with the customer to pay some or all of the termination charge that the customer must pay SBC. Payment by the CLEC of all or a substantial portion of the customer's termination charge would be such a large customer acquisition cost that it would be difficult to justify financially acquiring the customer. Moreover, payment of the termination charge by the CLEC may still provide a windfall to SBC by allowing SBC to recover more than the excess discount that the customer received over and above what the customer would have received under a contract of shorter duration. (*Id.*, p. 6) In summary, termination liability provisions such as those described in the Complaint and testimony in this case adversely impact TDS Metrocom's (and, we believe, other CLECs') ability to compete with SBC Illinois because they unreasonably tie up with SBC, for multi-year periods, business customers that would otherwise be good prospects for CLECs. (*Id.*, p. 8)

In the *ASCENT* Order, as summarized in Section II.B of this brief, the Commission ruled that termination charge provisions that required the customer to pay all or a substantial portion of the customer's remaining revenue commitment under the contract were unreasonable, and that a reasonable form of termination charge provision is one that requires the customer to pay SBC the difference between the discounts the customer actually received before termination and the discounts the customer would have received for a contract with the same length as the term the customer actually completed. Even if the Commission's directives in the *ASCENT* Order are construed as applying only to the term calling plans about which the complainants were complaining in that docket (ValueLink, CompleteLink and Straight Rate), the legal principles articulated, and the conclusions reached, by the Commission in that case are applicable to multi-year contracts and calling plans generally.

The underlying legal principles – which were thoroughly briefed by the parties in the *ASCENT* Case and thoroughly reviewed by the Commission in the *ASCENT* Order-- are that to be reasonable, a termination charge provision, like a liquidated damages clause or a damages award for breach, must bear a reasonable relationship to any loss or damage the seller experiences as a result of the buyer's earlier termination, and must take into account the costs that the seller avoids by not having to provide the product or service for the remainder of the contract term. (See discussion at pp. 15-25 of the *ASCENT* Order.) As the Commission pointed out, both <u>Restatement of Contracts</u> §356 and 810 ILCS 5/2-718 (the Uniform Commercial Code as adopted in Illinois) specify that damages for breach may be liquidated in an agreement but only at an amount that is reasonable in light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss; and that a contract provision fixing unreasonably large liquidated damages is void and unenforceable as a penalty. (*ASCENT* Order, pp. 19-20) Further, a termination liability provision that fixes unreasonably large liquidated damages for early termination must be considered unreasonable under Section 9-250 of the PUA. (*Id.*, p. 24)

Clearly, the Commission satisfied itself in the *ASCENT* Order that the termination liability provision it directed SBC to adopt – namely, one requiring the customer to reimburse SBC for the difference between the discounts the customer actually received prior to termination and the discounts the customer would have received for a contract with the same length as the term the customer actually completed – meets these fundamental legal principles for determining a reasonable liquidated damages (termination liability) provision. TDS Metrocom's principal recommendation is that the Commission should require SBC to incorporate this form of termination liability provision into all of its multi-year contracts and tariffed plans for business customers for Usage Services, Centrex Services and Data Services – not just the ValueLink, CompleteLink and Straight Rate calling plans.

To use a hypothetical example of the approach TDS Metrocom is recommending, and which is consistent with the Commission's analysis, conclusions and directives in the *ASCENT* Order, assume that a customer signed a five-year contract that provides for 15% discounts from SBC's generally-available prices for the services covered by the contract. Assume also that if the customer had signed a three-year contract, SBC would have provided 10% discounts from its generally available prices for the services covered by the contract. If the customer elects to terminate the five-year contract after three years, the customer would pay a termination charge equal to the difference between a 15% discount and a 10% discount (i.e., 5%) on the services the customer actually purchased during the three years it took service under the contract. This is no more and no less than the customer would have paid, and SBC would have received, if there had been a three-year contract in the first place.[7] (TDS Metrocom Ex. 1.0, p. 9)

However, TDS Metrocom also recognizes that during the course of this case, SBC Illinois has presented another alternative, in the form of its revised termination charge policies. The revised policies represent an improvement over the SBC termination liability provisions generally in effect for Usage and Centrex services at the time this Complaint was filed, in at least two respects. First, the revised termination liability policies are based on at least an attempt to identify the costs SBC saves or avoids in the event of early termination of a contract, and the actual loss or damage that SBC would experience due to early termination. Second, in the absolute, SBC's new termination liability provisions produce lower termination charges. Obviously, for example, reducing the termination charge in a Usage Services Agreement from 100%, 75% or 50% of the customer's remaining obligation under the contract or tariff plan to 35% of the remaining obligation reduces the absolute size of the termination charge the customer would have to pay. (TDS Metrocom Ex. 1.0, p. 8)

Taking the second point first, even at the reduced percentages employed in SBC's revised termination charge policies, the customer's termination liability can still be a significant dollar amount. TDS Metrocom witness Mr. Loch calculated the termination charge per remaining year of the contract term that would be applicable for each of the ten representative Usage Services agreements provided by SBC, based on SBC's revised termination liability policy. (TDS Metrocom Ex. 1.0, pp. 18-19) These amounts were displayed in Section II.D of this brief, above. As Mr. Loch testified, the termination charges produced by SBC's new termination liability

[7]TDS Metrocom also believes that it is reasonable for a termination charge provision to require the customer to pay (or repay) SBC for any installation, special construction or similar "up front" charges that had been waived or discounted at the outset of the contract term in recognition of the customer entering into a long-term agreement. (TDS Metrocom Ex. 1.0, p. 9)

provisions are still too high and will continue to significantly limit any switching by business customers taking service from SBC under term contracts and multi-year tariff plans. (TDS Metrocom Ex. 1.5, p. 3) Further, even though the amounts are reduced, the termination charges under SBC's revised policies continue to be based on charges for future services that SBC Illinois will never provide – rather than on return of the benefit the customer did not in fact earn from SBC (*i.e.*, the excessive discount). (TDS Metrocom Ex. 1.0, p. 18)

With respect to the first point, the percentages applied to the customer's remaining revenue commitment under SBC's new termination liability policies are intended to represent the annual revenue under the contract or tariff plan less SBC's saved costs if the contract is terminated and SBC no longer has to provide the service to the customer. TDS Metrocom did not have the resources available to audit the cost studies presented by SBC witness Mr. Flitsch in support of SBC's revised termination charge percentages. (TDS Metrocom Ex. 1.5, pp. 1-2) However, TDS Metrocom observes that by stating that the termination liability should be 35% of remaining revenues for Usage Services, 25% of remaining revenues for Centrex Services, and 50% of remaining revenues for Data Services and other services, SBC is indicating that it has 35%, 25% and 50% profit margins, respectively, on long-term contracts and tariff plans for these service categories – *even after providing discounted prices to the customer on the term contract or tariff plan*. (TDS Metrocom Ex. 1.5, p. 4) Such high profit margins seem inconsistent with the assertions made by the other SBC witnesses in this case that the business telecommunications services market in SBC Illinois' service area is highly competitive. As Mr. Loch observed, either SBC's profit margins on long-term contracts and tariff plans for business customers are not as high as SBC has depicted, or the market is not very competitive. (*Id.*, p. 4)

Taking into account the considerations discussed in the immediately preceding two paragraphs, TDS Metrocom recommends that *if* the Commission decides to allow SBC to continue to use the "percent of remaining revenue" form of termination liability provision (rather than requiring use of the form of termination liability provision specified in the *ASCENT* Order), the Commission should direct that the "percent of remaining revenues" percentages used in SBC's termination liability provisions should not exceed 25% for the termination charges for any of the three broad categories of services – Usage, Centrex and Data/other. (TDS Metrocom Ex. 1.5, p. 8) The percentages of 35%, 25% and 50% that SBC is adopting in its revised policies for Usage, Centex and Data/other services, respectively, are too high for the reasons discussed above – they would appear to reflect excessive and unreasonable (and unlikely, for discounted prices in a purportedly competitive market) profit margins; and they produce termination charges that are still so high in absolute amount as to present barriers to competitive switching. In contrast, a "percent of remaining revenues" percentage of 25% (which is the percentage that SBC is applying for Centrex Services in any event) will produce lower termination charges and constitute a more reasonable and realistic profit margin on these services.

B. SBC Should Continue to Provide Termination Charge Calculations to a CLEC That Has Written Authorization from the Customer

In Finding (10) of the *ASCENT* Order, the Commission directed SBC Illinois as follows:

> [C]alculation of a termination charge, pursuant to the formula described in Finding (9), should be performed by Ameritech upon termination of service by the customer or upon oral or written request from a customer, whichever occurs first; when such calculation is requested by a customer, it should be performed, and the results communicated to the customer, within three business days; the customer should be permitted to designate a telecommunications services provider as an agent for the purpose of requesting and receiving such calculation; in the event of a dispute with respect to such calculation, the burden of proving the correctness of the calculation should lie with Ameritech.

Subsequent to the *ASCENT* Order, SBC Illinois was (at least in TDS Metrocom's experience) routinely calculating customer termination charges for CLECs that presented written authorization from the customer to request and receive termination charge calculations. Indeed, it was through this process that TDS Metrocom learned of the termination charges that would be imposed on the specific customers described in the Complaint and in TDS Metrocom witness Stearns' testimony. (See Complaint, ¶17, 20, 25) During the course of this docket, however, TDS Metrocom became aware that SBC had decided to cease providing termination charge calculations to CLECs (even with written authorization from the customer), *except* for the specific services that were the subject of the *ASCENT* Order. After TDS Metrocom raised this issue, SBC confirmed, in the Surrebuttal Testimony of Michelle Kent, that SBC previously had responded to all CLEC requests for termination charge calculations, regardless of the product or service, but that SBC had decided to "cut back on the scope of the calculations performed for CLECs to those specified by the *Ascent* Order (i.e., the ValueLink services)." (SBC Ex. 5.0, pp. 7-8)

Regardless of the conclusion the Commission reaches in this case on the substantive issue of the form of termination liability provision, TDS Metrocom urges the Commission to require SBC Illinois to continue to provide termination charge calculations to CLECs that present written authorization from the customer to request and receive this information from SBC. This is an extremely important competitive issue. As TDS Metrocom witness Mr. Loch pointed out, a CLEC has absolutely no chance to compete with SBC for the business of a customer that SBC has signed to a long-term contract if the CLEC cannot obtain timely termination charge calculations from SBC. (TDS Metrocom Ex. 1.5, p. 9) As pointed out above, TDS Metrocom was able to learn about the termination charges that triggered the filing of its Complaint in this docket as a result of obtaining calculations of those termination charges from SBC pursuant to written letters of authorization provided by the customers. The CLECs' inability to obtain timely termination charge calculations from SBC Illinois will only serve to exacerbate the impacts of SBC's multi-year contracts and tariff plans and the associated termination liability provisions in shrinking the size of the business telecommunications market for which CLECs can effectively compete with SBC.

Through the Surrebuttal Testimony of Michelle Kent (SBC Ex. 5.0), SBC offered a number of reasons for no longer providing termination charge calculations to CLECs that present written authorization from the customer (other than for ValueLink services). None of SBC's reasons justify SBC's drastic departure from the practice it previously followed.

As a threshold matter, TDS Metrocom questions how SBC can refuse at all to provide termination charge calculations to a CLEC (or to any third party) that presents written authorization from the customer to request and receive the termination charge information from SBC. If the customer appoints a CLEC (or other third party) as the customer's agent in this regard, by written document, SBC should have no basis to refuse to provide the requested termination charge information to the third party that is acting on the customer's behalf.

Turning to the reasons offered by SBC witness Ms. Kent, she suggested that a CLEC can always obtain termination charge calculations through the customer, because SBC will continue to provide termination charge calculations to the customer upon customer request. She also suggested that the CLEC should be able to calculate the termination charges itself, at least to a reasonable approximation, using the customer's contract documents. (SBC Ex. 5.0, pp. 8-10) There are several problems with this suggestion. First, the customer (particularly a busy small business customer) may simply fail to follow up to make or pursue the request with SBC.

Second, although Ms. Kent elsewhere expressed concern about incorrect or unfocused termination charge requests received from CLECs (a concern discussed further below), it should be obvious that a CLEC representative, whose job it is to understand telecommunications products and services and prices, terms and conditions, is in fact more likely to present an accurate, focused request to SBC. Third, there is no substitute for an <u>accurate</u> calculation of the termination charge liability; both the customer and the CLEC will be frustrated and disappointed to calculate proposed pricing on the basis of an estimated termination liability to SBC, only to learn when the customer actually moves to terminate its SBC contract that the termination liability is in fact materially higher. But the most problematic aspect, from a competitive perspective, of SBC's "have the customer ask" suggestion is that when the customer calls his SBC representative to request a calculation of his termination charges, *the SBC representative is immediately given the opportunity to attempt to persuade the customer not to consider switching to the competitor*.

SBC's view that "its primary responsibility is to its customers, not to CLECs looking for new business. These requests can and should come from its customers, not from third parties (with or without an agency arrangement)" (SBC Ex. 5.0, p. 9) has already been properly disposed of in the electric and gas industries. This Commission would not for a nanosecond tolerate an electric or gas utility that decided to accept direct access switching requests, gas nominations, billing inquiries and similar requests only from retail customers, and refused to accept such requests and submissions from retail electric suppliers, alternative gas suppliers or other third parties possessing written agency authorization from the retail customer (and who, not coincidentally, are typically in competition with the electric or gas utility for the business of supplying the customer). There is no reason that this approach should be tolerated from the dominant incumbent in the telecommunications industry either.

Ms. Kent also expressed concern about the volume of termination charge calculation requests received and the fact that requests are received which are inaccurate or incomplete (*e.g.*, by not specifying all of the services for which the customer is under a term agreement with SBC).[8] (See SBC Ex. 5.0, pp. 4-7) At the outset, TDS Metrocom notes that it is SBC that has elected to lock up substantial numbers of business customers from competitors by signing these customers to multi-year service agreements with termination liability provisions. Requests from CLECs for termination charge calculations are a natural consequence of the business strategy that SBC has adopted – and the volume of such requests is obviously directly correlated to SBC's success in signing large numbers of business customers to such contracts. TDS Metrocom also emphasizes that it is *only* requesting that SBC be required to provide termination charge calculations to a CLEC that has written authorization from the customer to request and receive this information from SBC.

[8]The data provided by SBC in discovery on numbers of term contracts in effect and termination charge calculation requests received by SBC in 2001-2003, which is included in TDS Metrocom Exhibit 1.1 (Proprietary), shows that the vast, vast majority of termination charge calculation requests received by SBC in these years were for Data and other services contracts, with only a small number of such requests being received for Usage Services and Centrex Services contracts. Not coincidentally, it is the Data/other services contracts in effect in these years that tended to incorporate the "give back the unearned discount" form of termination charge provision – which SBC witness Ms. Kent characterized as the more difficult type of calculation (SBC Ex. 5.0, p. 11) – as opposed to the Usage Services and Centrex Services contracts that tended to use the "percent of remaining revenues" approach, which Ms. Kent described as "particularly straightforward" calculations. (*Id.*) (See TDS Metrocom Ex. 1.0, pp. 11-14, 18-20) This data belies Ms. Kent's claims that the customer and the CLEC should be able to calculate the termination charges themselves. To the contrary, SBC's own data indicates that most of the requests for termination charge calculations have occurred with respect to the contracts containing the more difficult-to-calculate termination charge provisions.

In any event, there are much less draconian ways for SBC to deal with the types of concerns expressed by Ms. Kent than simply ceasing to provide termination charge calculations to CLECs acting as the customer's agent. For example, SBC could design a form or series of forms with information that SBC needs to calculate the requested termination charges, which would have to be filled out properly and accurately before SBC processes the request. This approach could limit the number of unfocused or inaccurate requests that SBC receives, and would also require the CLEC to do more work on its own in order to obtain a termination charge calculation (thus addressing in part Ms. Kent's concern about CLECs purportedly engaging in costless "fishing expeditions" (SBC Ex. 5.0, pp. 10, 12)).[9] TDS Metrocom agrees that SBC should not be required to "guess" at what the customer or the CLEC wants calculated, and that SBC is only obligated to calculate what is requested. Again, there are more focused (and competition-friendly) solutions to the concerns expressed by SBC than to simply refuse to provide termination charge calculations to duly-authorized CLECs.

Finally, Ms. Kent expressed concern that given the growing volume of termination charge requests that SBC Illinois was experiencing, it is increasingly difficult for SBC to respond to those requests within three business days, as specified in the *ASCENT* Order. (SBC Ex. 5.0, pp. 6-7) TDS Metrocom would not object if SBC's response time were increased to five business days/seven calendar days. TDS Metrocom would consider a one-week response time to be commercially reasonable from the perspectives of SBC, the customer and the CLEC.

In summary, the Commission should direct (consistent with Finding (10) of the *ASCENT* Order) that for all multi-year contracts and tariffed plans for Usage, Centrex and Data/other services, SBC should provide to a CLEC a calculation of the termination liability to which a

[9]As the Commission is well aware, SBC regularly rejects CLEC orders that contain incorrect or incomplete information on SBC's electronic or paper forms.

business customer taking service under the contract or tariffed plan would be subject if the customer terminated the contract or plan, upon presentation by the CLEC of written authorization from the customer to request and receive the termination charge calculation. As noted above, TDS Metrocom would not object if SBC's response time for responding to these requests were increased from three business days (as specified in the *ASCENT* Order) to five business days/seven calendar days. To address the concerns SBC has expressed about having to provide termination charge calculations to CLECs possessing agency authorization from the customer, there are a variety of steps that SBC could take that would be less draconian and more competition-friendly than simply ceasing to provide these calculations to duly-authorized CLECs, and SBC is free to propose or implement such steps.

C. The Commission Should Order SBC to Reimburse TDS Metrocom for its Out-of-Pocket Legal and Other Expenses of This Proceeding

TDS Metrocom requests that the Commission order SBC Illinois to reimburse TDS Metrocom for its out-of-pocket legal and other expenses incurred in connection with this proceeding.[10] Even if the Commission does not adopt either of TDS Metrocom's recommendations with respect to SBC's termination liability policies (see Section III.A above), it is clear that the filing of this Complaint prompted (or at least brought to fruition) a comprehensive review and revision of SBC Illinois' termination liability policies. As the record in this case shows, SBC's revised termination liability policies are more consistent with the legal and competitive principles articulated by the Commission in the *ASCENT* Order, and will generally produce lower termination charges than the types of provisions SBC previously

[10] TDS Metrocom only seeks reimbursement for external and out-of-pocket costs (such as photocopy expense), and not for internal costs such as the time of TDS Metrocom employees who worked on this proceeding.

employed. Thus, by filing this Complaint and prosecuting this proceeding, TDS Metrocom has provided a benefit to customers and the competitive market.

As discussed in Sections II.A and II.C of this brief, the record shows that prior to the filing of this Complaint, SBC Illinois had in place hundreds (perhaps thousands) of multi-year agreements with business customers that included termination liability provisions requiring the customer to pay 50% to 100% of the customer's remaining revenue obligation under the contract in order to terminate. The revised termination liability policies announced by SBC during the course of this proceeding (i) actually purport to be based on a calculation of the costs SBC experiences if a customer exercises early termination of a multi-year contract, and (ii) reduce the "percent of remaining revenue" percentages in SBC's contracts to 35% for Usage Services, 25% for Centrex Services and 50% for Data/other services – both for new contracts and retroactively for existing contracts. Further, SBC did not in this proceeding attempt to justify and defend its previously-effective termination charge provisions, but rather responded to the Complaint primarily on the grounds that it is adopting revised termination liability policies. For example, as SBC's principal witness, Mr. Gillespie, stated in his direct testimony after briefly describing SBC's "current" termination liability provisions:

> Q. Are these policies the relevant ones to be examining in this proceeding?
>
> A. No. As SBC Illinois indicated in its Amended Answer to TDS' Complaint and as TDS acknowledges in its testimony, SBC is in the process of modifying its early termination liability policies across-the-board. These modified policies will apply to all products and services offered under term agreements (whether tariffs or ICBs), and to both new and existing customers (although customers on term agreements today will only be charged the *lesser* of the early termination liability that applies under their existing agreement and the amount that would result from the new policy). *Since these new policies will be in effect in the near future, they should be the focus of this proceeding, not the old policies that are being replaced.* (SBC Ex. 1.0, p. 10; first emphasis in original, second emphasis supplied)

Moreover, it is clear that SBC Illinois did not devote any significant attention and resources to comprehensively reviewing and revamping its termination liability provisions into a consistent set of policies – with lower "percent of remaining revenue" charges – until prodded to do so by TDS Metrocom's Complaint. As SBC witness Mr. Gillespie candidly admitted in direct testimony, "I do not dispute that fact that the filing of the TDS' Complaint prompted SBC Illinois to take a hard look at its existing tariff and ICB practices." He acknowledged that the TDS Complaint "accelerated a process that would have been undertaken at some point anyway, because it makes business and competitive sense." (SBC Ex. 1.0, p. 10) Further, the cost studies presented by SBC witness Mr. Flitsch to support SBC's revised termination liability provisions were initiated on October 23, 2003 (six weeks *after* TDS Metrocom's Complaint was filed) and completed on November 19, 2003.[11] The revised termination liability policies were implemented through tariffs filed by SBC in March 2004, some six months after TDS Metrocom's Complaint was filed.[12]

The Commission has statutory authority to order SBC Illinois to reimburse TDS Metrocom for its external legal and other costs incurred in this proceeding. Section 13-516(a)(3) of the PUA (220 ILCS 5/13-516(a)(3)) states: "The Commission shall award damages, attorney's fees, and costs to any telecommunications carrier that was subject to a violation of Section 13-514." Section 13-514 is one of the statutory provisions on which TDS Metrocom's Complaint was based, and prohibits a telecommunications carrier from knowingly impeding the

[11]See SBC Illinois' response to TDS Metrocom Data Request 3.8, included in TDS Metrocom Ex. 3.0.

[12]See SBC Illinois' response to TDS Metrocom Data Request 3.3, included in TDS Metrocom Ex. 3.0.

development of competition in any telecommunications services market – which SBC's "old" termination liability provisions clearly did.

Procedurally, TDS Metrocom proposes that the Commission's order direct SBC Illinois to reimburse TDS Metrocom for its external legal and related costs, and direct TDS Metrocom to submit a complete statement of the costs incurred to SBC with supporting documentation such as invoices. If SBC disputes any of the amounts or the documentation provided for the amounts and the parties are unable to resolve the dispute within 30 days, the parties should be allowed to bring the dispute before the Commission for resolution. (TDS Metrocom Ex. 1.5, p. 10)

IV. CONCLUSION

For the reasons set forth in this brief, TDS Metrocom requests that the Commission issue an order in this docket granting the relief requested by TDS Metrocom as summarized at pages 3-4 of this brief, above.

Respectfully submitted,

TDS METROCOM, LLC

by__________________________________

Peter R. Healy
Manager CLEC External Relations
TDS Metrocom, LLC
525 Junction Road, Suite 6000
Madison, Wisconsin 53717
(608) 664-4117
peter.healy@tdsmetro.com

Owen E. MacBride
6600 Sears Tower
Chicago, Illinois 60606
(312) 258-5680
omacbride@schiffhardin.com

Its attorneys